Supreme Court of Kentucky

CASE NO. 2015-SC-000575-D
(2015-CA-000328)
ON REVIEW FROM
THE COURT OF APPEALS

MAGOFFIN COUNTY BOARD OF ELECTIONS, ET AL. — APPELLANTS

v.

MAGOFFIN CIRCUIT COURT
2014-CI-00371

JOHN MONTGOMERY, ET AL. — APPELLEES

REPLY BRIEF OF MAGOFFIN COUNTY BOARD OF ELECTIONS

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CERTIFICATE OF SERVICE

I certify that on April 8, 2016, I served ten copies of this Reply Brief of Magoffin County Board of Elections Appellants via Federal Express overnight delivery to Susan Stokely Clary, Clerk, Kentucky Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601; and one copy via U.S. Mail, postage pre-paid, to Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable John Preston, Johnson County Judicial Center, 908 Third St., Suite 217, Paintsville, KY 41240; Gordon B. Long, Gordon B. Long Law Office, P.S.C., P.O. Box 531, Salyersville, KY 41465; James Deckard, HURT, DECKARD & MAY, PLLC, 127 West Main Street, Lexington, KY 40507; and Eldred E. Adams, Jr., Attorney At Law, 110 East Main Street, P.O. Box 606, Louisa, KY 41230.

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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Affirming the lower courts will create a cottage-industry of election contests. Every candidate who loses a close election will be incentivized to cry foul and file a lawsuit. At base there are two major problems with the courts' decisions below. First, affirming the decision of the Court of Appeals would essentially allow for election contests to be based on rumor or innuendo or even pure hope, rather than actual knowledge. This is contrary to a clear Kentucky statute requiring that the grounds of the contest be stated. Second, the standard to overturn elections would be substantially lowered. No longer would the contestant need to prove any more than technical violations, much less that those technical violations impacted the election. Speculation would be enough to justify throwing the certainty of an election away. This Court should reverse the Court of Appeals and return the law to a sensible path that allows challenges to fraudulent elections but does not encourage disappointed losing candidates to sue first and hunt for facts to support their challenge later.

I. ALLOWING LOSING CANDIDATES TO CONTEST ELECTIONS WITHOUT PLEADING THEIR GROUNDS IS DANGEROUS TO FUTURE ELECTIONS AND VIOLATES KENTUCKY LAW.

As set forth in the Board's opening brief, the lower courts based their determination that the election should be set aside on the ground that there were supposed irregularities in the absentee ballot process. In doing so, both courts' decisions violated KRS 120.155, requiring that a petition contesting an election state the grounds relied upon and forbidding a contestant from relying on any other grounds.

In his response brief, Mr. Montgomery attempts to claim that his vague reference in his Verified Petition to election officials having "violated KRS 117.075-.088 by

providing absentee ballots to people ineligible to vote, counting ballots of persons who had died, and other irregularities affecting the fairness and equality of the election" was the sort of particularized statement of grounds that would satisfy KRS 120.155's requirement. He says this despite that the evidence at trial did not show that ***any*** ineligible person voted or that ***any*** dead person's vote was counted. Instead, it appears that Mr. Montgomery believes that his references to the ten separate statutes contained within KRS 117.075-.088 (many of which are lengthy and have numerous subparts) and "other irregularities" were sufficient to state as grounds for the contest the following: that some ballot applications were missing Social Security numbers, the anticipated locations of the voters on Election Day, and/or the name of the individual requesting the absentee application; that in-house absentee voting proceeded for a limited amount of time prior to the appointment of a new Republican Commissioner; that on limited occasions the deputy clerk, by himself or with the Democrat commissioner, assisted voters; and that the Board failed to remove ballots and check signatures individually and shuffled the ballot envelopes on a table.

If Mr. Montgomery's argument is countenanced, KRS 120.155 may as well not exist. An election contestant would have every incentive to cite all potentially relevant statutes in her petition. Indeed, an election contestant would be foolhardy ***not*** to cite to all election statutes on the off-chance that something uncovered during discovery would provide a basis for later relying on this or that subsection of this or that statute as grounds for attempting to overturn the election. A careful lawyer would do nothing less. That happened here: while Mr. Montgomery entered the case seeking ineligible voters and dead people who voted, he abandoned those topics due to a complete lack of evidence

and shifted his focus to technical minutia about the absentee balloting process that he was not concerned about at the time he filed his Verified Petition. Because both the Circuit Court and Court of Appeals have permitted Mr. Montgomery's subsequent fishing expedition and resultant case-shift, Magoffin County is still paying the price today in the form of uncertainty about the finality of its Judge/Executive election in 2014.

Beyond those vague statements in his petition, Mr. Montgomery attempts to argue that his December 30, 2014 Response to a Motion to Dismiss filed by the Board and a deposition he took of County Clerk Renee Shepherd on January 7, 2015 somehow support the notion that he satisfied the requirements of KRS 120.155. They do not. For one, neither of those is the petition, and KRS 120.155 requires that the petition state the grounds relied upon, not some other filing or discovery device. Moreover, both the filing of the Response to the Motion to Dismiss and the deposition of Ms. Shepherd took place well after Mr. Montgomery's Verified Petition was filed on December 4, 2014. And that was the last day Mr. Montgomery was statutorily permitted to file an election contest. *See* KRS 120.155. As such, neither could possibly meet the requirement that the "petition . . . shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon."

Moreover, the Circuit Court's decision on the Board's Motion to Dismiss lays bare the fact that Mr. Montgomery did not plead the grounds that he ultimately relied upon in his Verified Petition. In that decision, the Circuit Court rejected the Board's argument that Count XIII, relating to absentee ballots, did not adequately plead the grounds upon which Mr. Montgomery was seeking to set aside the election.[1] In doing so,

[1] *See* Appendix A, January 12, 2015, Order denying Board's Motion to Dismiss, at 2.

it explained, "Count XIII states that in the election, election officials provided absentee ballots to people ineligible to vote, and counted ballots of persons who had died. . . . While it is clear that no allegations have been made as to any particular voter or voters who were . . . dead or otherwise ineligible to vote, the Plaintiff has made a sufficient allegation to proceed to an evidentiary trial."[2] The Circuit Court did not understand the Verified Petition to raise any issues with respect to the technical aspects of the absentee voting process, such as whether certain information was missing on certain applications, or the mechanics of the mail-in absentee vote counting process. It understood, as did Appellants, that Mr. Montgomery was going to produce living, breathing persons who voted though they were ineligible (or non-living persons who voted anyway).

Mr. Montgomery's attempt to rely on events that occurred well after the filing of his petition only serves to underscore the ever-changing focus of his case as he undertook his fishing expedition.[3] As explained in the Board's opening brief, that fishing expedition was helped by the Court's unlawful extension of Mr. Montgomery's time to present his case-in-chief past the 30 days statutorily permitted. *See* KRS 120.165(2). In his response brief, Mr. Montgomery insists that the extension of time he received "was never contested by Appellants" and in fact was agreed to by all parties "following the request of Hon. James Deckard for a delay in the scheduling time limits so he could go on a previously scheduled family vacation." Not so. At the scheduling conference held with the Court, the Board and Dr. Hardin objected to any extension of time being granted to

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[2] *Id.*

[3] Alas, even now Mr. Montgomery seeks to change his case. He cites in his brief to an unrelated indictment that contains none of the same parties or witnesses. Indeed, it appears that none of the evidence in that unrelated criminal case will be the same as the evidence in this case. That indictment should not be considered by this Court for numerous reasons, not the least of which is that the parties and this Court is bound by evidence of record in this case. Opposing counsel surely knows this, yet he grasps at that unrelated case because the record does not support his claims.

Mr. Montgomery.[4] The Court entered an order setting the trial of this case to begin February 2, 2015, well past the thirty days after service of the summons that KRS 120.165(2) afforded for Mr. Montgomery to complete his case-in-chief.[5] Notably, despite Mr. Montgomery's new-found claim that all parties agreed to that date, the Court's Order was not termed an agreed order, nor did it make any other reference to the parties agreeing to the dates therein. Moreover, it did not attempt to set forth any just cause whatsoever for the extension of time provided to Mr. Montgomery to present his case-in-chief beyond the statutory deadlines. It simply provided Mr. Montgomery the time to forage for a case he never pled to replace the one he did plead but for which he was unable to find evidence to support.

II. MR. MONTGOMERY FAILED TO SHOW THAT THE ALLEGED IRREGULARITIES WERE "FLAGRANT, EXTENSIVE, AND CORRUPT" OR THAT THEY AFFECTED THE ELECTION.

Even had he properly pled the case he presented to the Circuit Court and upon which the Circuit Court and Court of Appeals relied in determining that the election should be set aside, Mr. Montgomery failed to show that these violations were anything but technical violations. In his response brief, Mr. Montgomery makes virtually no attempt to grapple with the lack of any evidence even suggesting, much less conclusively demonstrating, that any of the alleged technical deficiencies in the absentee voting process had any effect whatsoever on the outcome of the election.

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[4] Mr. Deckard's pre-scheduled vacation was after the date by which Mr. Montgomery was required to present his case-in-chief. Dr. Hardin and the Board opposed any extension. After the Court indicated it would extend the date over Appellants' objections, Mr. Deckard asked that the Court not conduct the trial during the week he had scheduled his vacation. It is a far cry to say that any of the Appellants agreed to the extension because of that request. Notably, Mr. Montgomery's former counsel, who was actually present at that meeting, never argued at the Court of Appeals or elsewhere that Appellants agreed to the extension.

[5] Notably, Mr. Montgomery was producing expert reports up until the last business day prior to trial.

For instance, Mr. Montgomery continues to complain that some absentee ballot applications were lacking Social Security numbers. In doing so, he quotes from the Circuit Court's Judgment that the "purpose" of "requiring" Social Security numbers was "to allow the verification of the identity of the voter, and to allow a subsequent review of that verification" and that the Circuit Court could not "conduct a review of the validity of those applications in the absence of such indication."[6] But the Circuit Court's statement was thoroughly unsupported by any testimony, evidence, law, or even common sense. Mr. Montgomery resorts to quoting the Circuit Court rather than pointing to any evidence in the record showing, for instance, that a voter Mr. Montgomery tried to locate could not be located due to the lack of Social Security number or that the Social Security numbers played some part in permitting ineligible voters to vote because there is no such evidence. The same is true of Mr. Montgomery's continued complaints that some portion of the absentee ballot applications did not state precisely where the voter expected to be on Election Day (although each application provided the reason that the voter was voting absentee). His complaints are devoid of any tie to any evidence that any voters lacking such information on their applications improperly voted absentee. These complaints are nothing more than an effort to use technical minutiae to cast doubt upon a class of voters with whom Mr. Montgomery performed poorly.

Mr. Montgomery also bafflingly continues to insist that by conducting in-house absentee voting without a Republican Board member for a handful of days until a Republican Board member could be appointed to replace the one who retired shortly before the election, the Board violated KRS 117.085(1)(h). However, Mr. Montgomery

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[6] *See* Appendix B to Appellant's original brief, Judgment at 49 (*quoted in* Brief for John Montgomery at pp. 12-13).

does not even attempt to address the language in KRS 117.085(1)(h) permitting the county clerk or deputy county clerks to supervise the in-house absentee voting if the Board of Elections does not or cannot serve as election officers. He fails to attempt to do so in spite of the fact that even the Court of Appeals' majority found that there was no violation. It is clear why he makes no attempt: there is no way for Mr. Montgomery to address that language other than admitting that it renders his entire argument nugatory.

Mr. Montgomery further suggests that the entire election should be set aside because County Clerk Shepherd and Democratic vote challenger Jerry Helton explained that the close quarters of the in-house absentee voting space and the requirement that voting machines be in view of the poll workers would occasionally permit her to overhear some voters who were being assisted in voting. No law stands for that principle, of course. Moreover, both Ms. Shepherd and Mr. Helton made clear that generally they could not overhear specific choices of the voters. Ms. Shepherd said that she could only overhear individuals who spoke loudly, and that it was less than once a day that she would be able to hear a voter state for whom they were voting. Mr. Helton similarly testified that it was infrequent that he would overhear for whom a voter was voting; mostly he would just hear garbled talking. Indeed, overhearing individuals voting was such a rare and limited event that Garlena Workman, the Republican challenger that was positioned extremely close to Ms. Shepherd throughout the in-house absentee voting, testified that she could not hear anyone voting. Most importantly, Mr. Montgomery again fails to explain how or why this supposed infraction affected the election at all.

So too, while Mr. Montgomery continues to complain about the Board's supposed "illegal manner" of counting mail-in absentee ballots, he cannot point to any evidence

showing some real effect on the election from the Board having removed mail-in absentee ballots from the box wholesale rather than individually; from a collective examination of signatures rather than Ms. Shepherd doing so alone; or from shuffling the ballots on a table rather than placing them back in the box to be shaken. The Republican member of the Board testified that these changes were done to actually infuse more integrity into the process.[7] Knowing that the record does not support that these procedures had an effect on the election, Mr. Montgomery resorts in his brief to supposition and conjecture about some theoretical way these could have influenced the election. But it is too late for that conjecture; Mr. Montgomery had his opportunity to present proof on the subject and declined to do so.

For instance, Mr. Montgomery, in a spirit of hyperbole, deems the absentee vote counting process a "free-for-all" and suggests that it "***could***" have "allowed for the insertion of illegal ballots" or "prevent[ed] the opportunity for a proper challenge to the bona fides of absentee voters and their ballots."[8] He further points to the testimony of his paid handwriting expert, Thomas Vastrick that Vastrick's analysis indicated that 43 signatures on mail-in ballots had significant characteristic differences from the voter's voter registration card (which were often signed decades prior to the ballot).[9] But Mr. Montgomery had the opportunity to call to the stand ***any*** of the individuals whose signatures Mr. Vastrick challenged (or any other absentee voter) to demonstrate that the

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[7] Testimony of Justin Williams on February 9, 2015, at VR 1:40:30 to 1:41:05.

[8] Brief for John Montgomery at pp. 14-15 (emphasis added).

[9] Of course, Mr. Vastrick is a supposed handwriting expert that could take his time in reviewing signatures, in contrast to the laypersons on the Board making an examination on Election Day, and thus his analysis is hardly indicative of what could have or would have happened on Election Day. Moreover, as explained in the Board's opening brief, Mr. Vastrick's testimony was hardly a model of certainty or veracity as to his conclusion. *See* Brief for the Board at 2, 4-5.

individual was not the voter or to otherwise question them about their absentee voting "bona fides." The ***only*** individuals on Mr. Vastrick's list that testified at trial were Stephanie Montgomery (Mr. Montgomery's niece) and Stacy Russell. Although they were called to the stand for an unrelated purpose, each testified that they signed the documents in question, and Mr. Russell explained that he had hurt his writing hand and thus signed the ballot with his other hand.[10] They highlight the necessity of actually calling to the stand persons accused of fraudulent voting activity.

Perhaps recognizing that the evidence does not bear out that the procedures used by the Board had any effect on even a single absentee ballot, Mr. Montgomery attempts to convince the Court that the facts that there were a lot of absentee ballots in Magoffin County relative to surrounding counties and that Mr. Montgomery did comparatively worse in the absentee voting than he did at the polls on Election Day "raises serious suspicions and cannot be condoned."[11] But Mr. Montgomery's poor showing among absentee voters is hardly reason to disenfranchise voters. There was uncontradicted testimony explaining that Magoffin County has always experienced a high level of absentee voting because of the number of its workers that work in other counties. There was further uncontradicted testimony explaining why absentee voters were more likely to vote for Dr. Hardin: (1) his large support among union workers, who made up a large portion of absentee voters due to their out-of-county work; and (2) his support among elderly and sick individuals, many of whom he treated as part of his physician practice.

Simply put, Mr. Montgomery had every opportunity to put on actual evidence (as opposed to resorting to baseless speculation) to try and show that the supposed technical

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[10] *See* Brief for the Board's at 5.

[11] Brief for John Montgomery at p. 15.

deficiencies upon which he rested his case did have an effect on the absentee voting. But he failed to identify a single absentee vote that was cast by a voter who was ineligible to cast it (whether due to an ability to vote at the polls on Election Day, lack of residence in Magoffin County, or any other reason that would have rendered the voter ineligible to vote). He also failed to identify a single absentee vote that was cast by someone other than the individual that was identified as the voter. He further failed to identify a single absentee voter that testified that the voting process conducted by the Board – whether in-house or mail-in – affected that person's vote. Instead, Mr. Montgomery simply asks the Court to throw out an election because he did not win enough of the absentee vote to win the general election. That, of course, is no reason to disenfranchise voters.

CONCLUSION

Voiding this election will have pernicious consequences to future elections. Rumors and innuendo are rampant in all close elections, and affirming the lower courts will incentivize losing candidates to contest an election based on those unsubstantiated rumors—as occurred here. Worse still, affirming will enable that losing candidate to file a suit making only the most general and vague allegations with the hope that evidence will be uncovered from which an actual challenge can then be fashioned. That is backwards. This Court's precedent and enactments of the General Assembly require one contesting an election to state their grounds and to prove that those grounds are more than mere technical violations and that they affected the election. The decision below should be reversed.

Counsel for Magoffin County Board of Elections